(2)

No. 06-619

In the

Supreme Court of the United States

BACCARAT FREMONT DEVELOPERS, LLC,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; and LT. COL. TIMOTHY S. O'ROURKE, DISTRICT ENGINEER, SAN FRANCISCO DISTRICT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is Petitioner, whose action challenging a United States Army Corps of Engineers wetlands jurisdictional determination was pending when this Court issued its decision in the consolidated cases *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*, __ U.S. __, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (June 19, 2006) (collectively, "*Rapanos*"), entitled to a redetermination, conducted in accordance with the principles announced in *Rapanos*, of the existence or absence of federal jurisdiction over Petitioner's wetlands?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Under Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for certiorari filed by Baccarat Fremont Developers, LLC (Baccarat). Written consent was granted by counsel for all parties and lodged with the clerk of this Court.

PLF was founded over thirty years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates limited government, individual rights, and free enterprise. PLF has litigated numerous cases addressing the need for a balanced approach to environmental regulation, and PLF attorneys were counsel of record in *Rapanos v. United States*, 126 S. Ct. 2208 (2006), decided by this Court last Term.

PLF's analysis of the new jurisdictional test under *Rapanos* will provide a valuable and necessary viewpoint to assist the Court in determining whether to grant the petition.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns the statutory scope of the Clean Water Act and, specifically, whether wetlands considered "adjacent" to waters of the United States prior to this Court's decision in *Rapanos* also necessarily qualify as adjacent wetlands in light of *Rapanos*. Shortly after this Court granted the petitions for certiorari in *Rapanos* and its consolidated counterpart, *Carabell v. United States*, the United States Court of Appeals for the

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Ninth Circuit issued the original panel decision in this case, determining that the United States Army Corps of Engineers (Corps) has jurisdiction under the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, over Baccarat's property, App. A at 13a.

The circuit determined that Baccarat's wetlands are "adjacent" to waters of the United States within the meaning of 33 C.F.R. § 328.3(c) and this Court's decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). App. A at 13a. The appellate court also held that the issue of "adjacency" jurisdiction under the Clean Water Act was not addressed in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001). App. A at 10a. The circuit never addressed the new jurisdictional standard in *Rapanos*, in which this Court invalidated the "adjacency" definition of 33 C.F.R. § 328.3(c) and limited *Riverside Bayview* to its facts. Instead, the standard the Ninth Circuit actually applied would find jurisdiction regardless of the quantity or quality of the surface flow connection between Baccarat's property and the waters of the United States. Notwithstanding this obvious tension between the original panel decision and *Rapanos*, Baccarat's petition for rehearing and rehearing en banc was summarily denied more than a month after *Rapanos* was decided. App. H at 51a-52a.

The Ninth Circuit's tacit assumption that pre-*Rapanos* adjacency necessarily satisfies the jurisdictional requirements announced in *Rapanos* cannot withstand scrutiny. Pre-*Rapanos* adjacency jurisdiction was predicated upon this Court's decision in *Riverside Bayview*, yet that case's upholding of the Corps' adjacency jurisdiction was based upon the premise that adjacent wetlands are, for all practical purposes, indistinguishable from their abutting navigable waterway. *See Riverside Bayview*, 474 U.S. at 134. In contrast, Baccarat's property is clearly separated from waters of the United States by a man-made berm. App. A at 2a-3a; App. B at 16a.

Regardless of the nature and extent of the Corps' "findings" of an alleged *SWANCC*-style significant nexus between Baccarat's property and waters of the United States, *see* App. A at 13a, the appellate court still erred in failing to re-analyze the case in light of *Rapanos*. Prior to *Rapanos*, the Corps' position, and that of several courts of appeals, was that a significant nexus is established through the existence of a hydrological connection or, alternatively, through adjacency. This Court expressly rejected that standard in *Rapanos* and *Carabell*. In those consolidated cases, the plurality opinion authored by Justice Scalia states that a hydrological connection is a necessary but not sufficient condition to Clean Water Act jurisdiction. *See Rapanos*, 126 S. Ct. at 2226-27 (plurality opinion). The concurring opinion authored by Justice Kennedy states that the touchstone for Clean Water Act jurisdiction, whether by hydrological connection or adjacency, is the existence of a significant nexus, which is demonstrated by wetlands' significant effect on the chemical, physical, or biological integrity of the waters of the United States. *See id.* at 2248. Prior to *Rapanos*, there was no such requirement for establishing a significant nexus. Nor is there any indication, either from the Ninth Circuit's original panel decision or its summary rehearing petition denial, that it viewed the Corps' findings as establishing jurisdiction under either *Rapanos* test. Consequently, Amicus urges the Court to grant the petition for writ of certiorari to vacate the decision below and remand the matter to the Ninth Circuit to allow it to apply the proper jurisdictional standard.

ARGUMENT

I

VACATURE AND REMAND ARE NECESSARY TO ALLOW THE LOWER COURT TO APPLY THE CORRECT STANDARD FOR CLEAN WATER ACT JURISDICTION

The Ninth Circuit decided Baccarat's appeal prior to the issuance of *Rapanos*. The appellate court's summary denial of Baccarat's petition for rehearing and rehearing en banc, issued after *Rapanos*, did not even cite to that precedent. The Ninth Circuit's failure to apply the current and binding precedent of this Court to Baccarat's appeal constitutes such a gross departure from normal appellate practice to justify this Court's intervention, vacature, and remand of the decision below.

The Ninth Circuit determined in its original panel decision that Clean Water Act jurisdiction extends to Baccarat's property because the latter is "adjacent" to waters of the United States. The opinion reasoned that this Court in *Riverside Bayview* upheld the Corps' wetlands adjacency jurisdiction as set forth in 33 C.F.R. § 328.3(c), and that *SWANCC* did not disturb that result. *See* App. A at 13a. But this conclusion cannot stand, for under any reading of *Rapanos*, the adjacency criterion has been dispensed with, replaced with a new jurisdictional test that operates on different variables and produces jurisdictional results not necessarily coextensive with those produced by the pre-*Rapanos* adjacency standard.

In *Riverside Bayview*, this Court was presented with the question of whether wetlands that are inseparably bound up with a navigable waterway (traditionally understood) can be regulated under the Clean Water Act. It held that the Corps' interpretation of the Clean Water Act, which would allow such jurisdiction, is reasonable. *See Riverside Bayview*, 474 U.S. at

134. The Court's conclusion was informed by scientific and practical concerns; it recognized that the identification of where water ends and land begins is not easy. In between those two extremes lie "shallows, marshes, mudflats [and] bogs." *Id.* at 132. But where a wetland is not inseparably bound up with a navigable waterway—*i.e.*, where one can clearly distinguish the terminus of the water from the emergence of land—adjacency jurisdiction is not present.

Here, Baccarat's wetlands are clearly distinguishable from the flood control channels that are conceded to be "waters of the United States." Baccarat's property is separated from those channels by man-made berms. App. A at 2a-3a, App. B at 16a. The channels are never closer than 65 to 70 feet from Baccarat's property. App. A at 3a. No one therefore can reasonably conclude that Baccarat's property is indistinguishable from the flood control channels. The regulation of Baccarat's property does not present the difficult question of "[w]here on this continuum [of water and land] to find the limit of 'waters,'" *see Riverside Bayview*, 474 U.S. at 132, an issue that informed the *Rapanos* majority's rejection of a theory of Clean Water Act jurisdiction that would operate independently of the quantity or quality of the relevant surface water connection, *see Rapanos*, 126 S. Ct. at 2227 (plurality opinion); *id.* at 2248 (Kennedy, J., concurring in the judgment).

Thus, the Ninth Circuit's use of the pre-*Rapanos* adjacency criterion is wrong because that standard does not coincide with the new jurisdictional tests announced in *Rapanos*. Under the jurisdictional tests set forth in Justice Scalia's plurality opinion and Justice Kennedy's concurring opinion, adjacency, although at times peripherally important to the jurisdictional inquiry, is no longer the linchpin of the analysis. Rather, both the plurality opinion and Justice Kennedy's concurrence operate on terms distinct from pre-*Rapanos* adjacency.

According to the plurality opinion, Clean Water Act jurisdiction obtains over wetlands if and only if the wetlands have a continuous surface water connection with the jurisdictional body of water such that it cannot be determined where the water ends and the wetlands begin. *Rapanos*, 126 S. Ct. at 2227 (plurality opinion). Although one might overlay adjacency terminology onto this rubric, the fact of adjacency, *i.e.* geographic proximity, is insufficient to establish jurisdiction. And because no continuous surface water connection exists between Baccarat's property and any water of the United States, Clean Water Act jurisdiction, according to the *Rapanos* plurality opinion, is not present.

A similar result obtains under the test set forth in Justice Kennedy's concurring opinion. For Justice Kennedy, the Corps has jurisdiction to regulate wetlands "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 2248 (Kennedy, J., concurring in the judgment). While a hydrological connection is not necessary to establish jurisdiction, its presence does not guarantee jurisdiction. *See id.* at 2251-52. With one exception not relevant here,[2] mere adjacency cannot establish wetlands jurisdiction. *See id.* Rather, the Corps must demonstrate that a significant nexus connects the wetlands to a traditional navigable waterway. The Corps' findings to that effect, discussed by the Ninth Circuit, do not establish that nexus.

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[2] Justice Kennedy suggested in his concurring opinion that wetlands adjacent to navigable-in-fact waters may be presumed to bear the requisite significant nexus. *See Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring in the judgment). But as Baccarat notes in its petition, no court has found that the flood control channels near Baccarat's property are navigable-in-fact. Petition at 12-13 n.4.

The Corps' first finding, that the wetlands are in reasonable proximity to the flood control channels, does not establish a significant nexus. As Justice Kennedy explained in his concurring opinion, "mere adjacency to a tributary of this sort [*i.e.*, nonnavigable] is insufficient; a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow towards it." *Id.* at 2252. The second finding, that the wetlands serve important environmental functions to nearby tidal waters, does not establish a significant nexus. At most the finding supports the scientifically obvious: wetlands are important to the aquatic environment. But if that were the operative criterion, then all wetlands in the Nation would arguably be subject to Clean Water Act jurisdiction. Justice Kennedy expressly rejected that proposition. Although environmental concerns were important in Justice Kennedy's estimation, *see* 126 S. Ct. at 2246-47, those concerns shape the significant nexus test, rather than constitute an independent basis of jurisdiction. *See id.* at 2248-49.

The Corps' third finding, that Baccarat's wetlands are important given the loss of wetlands in the San Francisco Bay area, does not, properly speaking, have anything to do with a substantial nexus. The degree of connection between Baccarat's property and the flood control channels is not what supposedly makes the property important according to this finding; it is rather the fact that the *quantity* of wetlands has been reduced. But Justice Kennedy's significant nexus test is a qualitative not quantitative inquiry. The Corps' fourth finding, that Baccarat's property is within the 100-year flood plain, does not of its own establish a significant nexus. *See Rapanos*, 126 S. Ct. at 2251 (concluding that mere assertion of possible flooding suggests an "undue degree of speculation" insufficient to establish jurisdiction).

Lastly, the Corps' fifth finding, that Baccarat's property is part of a single hydric soil unit also containing tidal waters, does not establish a significant nexus. The Corps argues in

essence that a groundwater connection is sufficient to establish a significant nexus. But regulation of groundwater as part of the "waters of the United States" is inconsistent with both the plurality's and Justice Kennedy's tests, which focus on surface water connection (or the lack thereof) to establish federal jurisdiction. *See id.* at 2225-26 (plurality opinion). *See also id.* at 2242 (Kennedy, J., concurring in the judgment) (criticizing plurality test for potentially upholding jurisdiction over the "merest trickle"). Even under Justice Kennedy's test, where jurisdiction may be present in the absence of a hydrological connection, that absence is relevant within the context of a surface water connection. *See id.* at 2251 ("Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system."). Thus, to hinge the jurisdictional inquiry on hydric soils would expand rather than contract pre-*Rapanos* Clean Water Act jurisdiction, and would be inconsistent with the narrowing intent of the *Rapanos* majority.

The Ninth Circuit's reliance on "adjacency" jurisdiction to uphold the Corps' assertion of regulatory authority over Baccarat's property simply fails to account for this Court's recent decision in *Rapanos*. Pre-*Rapanos* adjacency is not a reliable indicator of jurisdiction after *Rapanos*, for neither Justice Scalia's plurality opinion nor Justice Kennedy's concurring opinion turns upon geographic proximity. Therefore, this Court should grant Baccarat's petition for writ of certiorari, vacate the judgment of the Ninth Circuit, and remand the case for further proceedings consistent with *Rapanos*.

II

BECAUSE THE SCALIA PLURALITY OPINION IS CONTROLLING IN *RAPANOS*, CLEAN WATER ACT JURISDICTION CANNOT BE ESTABLISHED IN THE ABSENCE OF A CONTINUOUS SURFACE WATER CONNECTION

As described above, under the *Rapanos* plurality test, a wetland can be "adjacent" to a jurisdictional body of water, and thus itself subject to jurisdiction, if and only if the wetland has a continuous surface water connection with the jurisdictional body of water such that one cannot tell where the water ends and the wetland begins. *Rapanos*, 126 S. Ct. at 2227 (plurality opinion). In contrast, under the test announced in Justice Kennedy's concurring opinion, a wetland is jurisdictional "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 2248 (Kennedy, J., concurring in the judgment).

Although the *Rapanos* majority did not agree upon a single legal standard for determining Clean Water Act jurisdiction, the rule announced by the Court in *Marks v. United States*, 430 U.S. 188 (1977), for determining the holding of the Court when no opinion garners a majority of justices' votes suggests that the *Rapanos* plurality opinion is controlling. Under the *Marks* rule,

> [w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members

> who concurred in the judgments on the narrowest grounds . . . .

Id. at 193 (quotation marks omitted).

Among the *Rapanos* majority opinions, the plurality opinion constitutes the "narrowest grounds" because its rationale is a logical subset of Justice Kennedy's concurrence. *See United States v. Williams*, 435 F.3d 1148, 1157 n.9 (9th Cir. 2006). The *Marks* rule is founded upon the principle that an opinion which is a logical subset of another opinion concurring in the same judgment would necessarily gather the votes of all Justices joining in the Court's disposition. Put another way:

> The Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule. That is, if a statute is found to be constitutionally permissible pursuant to a strict scrutiny standard of review, then it is necessarily permissible pursuant to a rationale basis standard of review. From the text of the alternative concurring opinions, it is possible to determine that if all of the Justices apply the narrower rule, the outcome would have been the same.

Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603-04 (1992).

In *Rapanos*, the plurality test is comparable to the narrower strict scrutiny standard whereas Justice Kennedy's test is comparable to the broader rational basis standard.

According to the plurality in *Rapanos*:

> Wetlands are "waters of the United States" if they [are] . . . as a practical matter *indistinguishable* from waters of the United States. . . . [Whereas] Justice KENNEDY's test is that they, "either alone or in combination with similarly situated lands in the

> region, significantly *affect* . . . other covered waters more readily understood as 'navigable.'" But what possible linguistic usage would accept that whatever (alone or in combination) *affects* waters of the United States *is* waters of the United States?

Rapanos, 126 S. Ct. at 2234 (plurality opinion).

Justice Kennedy's test is arguably broad enough that the plurality found that in practice the test would closely track the government's "any hydrological connection" test which the *Rapanos* majority struck down. *See Rapanos*, 126 S. Ct. at 2235 n.15 (plurality opinion). Clearly, a wetland that satisfies the plurality's test for federal jurisdiction will also satisfy Justice Kennedy's test. Even the *Rapanos* dissent acknowledged this undeniable fact:

> I assume that Justice KENNEDY's approach will be controlling in most cases because it treats more of the Nation's waters as within the Corps' jurisdiction, *but in the unlikely event that the plurality test is met but Justice KENNEDY's is not*, courts should also uphold the Corps' jurisdiction. In sum, in these and future cases the United States may elect to prove jurisdiction under either test.

Rapanos, 126 S. Ct. at 2265 n.14 (Stevens, J., dissenting) (emphasis added).

As Justice Stevens observed, it would be an "unlikely event that the plurality test is met but Justice Kennedy's is not." In other words, the plurality opinion was decided on the "narrowest grounds" because it is less sweeping and would require the same outcome in a subset of the cases that the more sweeping test of Justice Kennedy would. In point of fact, a wetland that meets the plurality's test for federal jurisdiction would not only satisfy the four Justices in the plurality as well

as Justice Kennedy, but it would also satisfy the four Justices in the dissent, for a unanimous vote of this Court.

Thus, because the *Rapanos* plurality opinion controls, and because no continuous surface flow exists between Baccarat's property and other jurisdictional waters (a requirement of the plurality opinion), *see* App. A at 3a, Clean Water Act jurisdiction does not extend to Baccarat's property.

CONCLUSION

For the foregoing reasons, this Court should grant Baccarat's petition for writ of certiorari.

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Respectfully submitted,

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